are many cases where eye-witnesses at the scene of an attack, or persons arriving shortly thereafter, may hear the last words spoken by a dying man and their recollection of those words will properly be received in evidence. In practice, of course, such a witness would be required to give the exact words spoken by the deceased and, in so far as they are relevant, any words spoken to the deceased by the witness himself.

If, however, the dying declaration is reduced to writing — and this would invariably be the case in the event of the witness in question being an investigating Police Officer, Magistrate or someone of that kind — the actual words of the deceased must be recorded.

The principle underlying this rule was explained by Cave J. in *R.* v. *Mitchell*[1]. The reason for the rule is clear, namely, that if the deceased's statement is taken down in narrative form that amounts in effect to the witness himself drawing inferences and, perhaps, filling gaps in the deceased's statement, which are properly matters within the province of the Judge and jury. It is for them to draw any necessary inferences from the actual words of the deceased and not for the witness who heard the words spoken.

In *R.* v. *Bottomley*[2], the question arose as to whether Cave J. intended to rule that in every case questions as well as answers must be recorded, and Lawrence J. held that a dying declaration in the form of question and answer was admissible although the answers only and not the questions had been recorded.

It seems to us however that there is no real conflict between the two cases as it may well be that in the light of the particular facts — as no doubt was the case in *R.* v. *Bottomley* — the form of the question may be conclusively adduced from the answer itself. In such a case the Court would no doubt hold that the omission to record the question was not a fatal defect. In other cases where the question does not become obvious from a consideration of the answer the omission to record the question might well render the dying declaration inadmissible. This would seem to be a question of fact, depending upon the particular circumstances of each case.

In our opinion, in the present matter the omission to record the actual words of the deceased is a fatal defect. We would add that the importance of recording the actual words is clearly demonstrated in such a case as the present where the deceased and the witness conversed in Malay, which was not the mother tongue of either, and the conversation was recorded in English.

The dying deposition being inadmissible, it is not suggested by the Crown, in the circumstances of this particular case, that the conviction can stand.

The appeal must therefore be allowed and the conviction quashed.

Appeal allowed.

ITAM & ANOR v. ZAIN

[O. C. J. (Syed Sheh Barakbah J.) November 11, 1960]

[Alor Star — Kedah Civil Suit No. 1 of 1960]

Land Laws — Transfer — Deed of Sale — "Penukar Hebah" — Meaning of.

A transfer form (called a "Deed of Sale") transferring land in Kedah in 1911, when the Registration of Documents Enactment, 1310 (1890), was in force, contained the words "Penukar Hebah".

Held: these words did not mean that the transfer was by way of conditional gift.

CIVIL SUIT.

Hwang Yang Chu for the plaintiff.

Wong Sheng Chan for the defendant.

Syed Sheh Barakbah J.: This is somewhat a complicated case due to the death of the parties concerned. The facts briefly are as follows.

Tok Ajar is the grandmother of Khatijah binti Md. Arshad and Habsah binti Mat Salleh who jointly owned a piece of land under an old title Surat Kechik No. 372, Mukim Sala Kechik, District of Kota Star. According to PW1 Tok Ajar approached the said Khatijah and Habsah for a loan of money and as they had no money they offered to give her their land for the purpose of raising a loan. In order to effect the transfer they had to fill in a form called "Deed of Sale" and the transfer was executed on 21.5.1331 (1911), transferring the said land to Tok Ajar. Exhibit P2 is the certified copy of the "Deed of Sale" and Exhibit P-2B is the Register containing the original. At the top right hand corner of Exhibit P2 are the words "Register Penukar No. 60/31". On 2.12.1331 Tok Ajar executed a charge of the said land in favour of Lebai Mat Ariff for $300.00. Tok Ajar died in 1334 (1914) and Lebai Mat Ariff also died in the same year. Habsah then died in February 1945 followed by Khatijah in August 1953.

Yahaya applied for Letters of Administration on the estate of Tok Ajar in December 1953. Yahaya then died and his son Zain (defendant), obtained Letters of Administration *De bonis non* on 30th December, 1959. Itam bin Md. Ariff, the first plaintiff, was appointed administrator of the estate of Khatijah on 3rd December 1958 and Mat Isa, the second plaintiff became administrator of the estate of Habsah binti Mat Salleh on 31st December 1959.

Now both plaintiffs, Itam and Mat Isa as administrators of Khatijah and Habsah respectively claim against Zain bin Yahaya, the defendant, administrator of the estate of Tok Ajar, for the retransfer of the said land to the estate of Khatijah and Habsah (deceased) on the ground that it was a conditional gift. The defendant alleged that it was a sale for $1,200 the amount of which was received by the said Khatijah and Habsah.

Counsel for both parties agreed that the only issue before the Court was the interpretation of the words "Penukar Hebah" mentioned in the title deed, Exhibit "A". What do they really

mean? There is no difficulty about the Malay word "Hebah" which means gift without consideration. PW3 and PW4 agreed on this. They also agreed that the value of the land mentioned in the "Deed of Sale" and the amount received were always inserted for the purpose of stamp duty in respect of transfers by way of sale as well as by way of gift. The real problem is to ascertain the meaning of the words "Penukar Hebah.'

PW3, the Land Officer, produced exhibit P-2B which contains the original Deed of Sale. In it there are only two "Register Penukar" namely Nos. 60/31 and 69/31 although PW3 said there was only one in it, namely No. 60/31, the document in question. The rest are all just numbers without the words "Register Penukar". In the form below the heading "Deed of Sale" are written words "Surat $\frac{\text{Perjualan}}{\text{Hebah}}$ Tanah" (Memorandum of Sale of Land or Memorandum of Gift of Land).

PW4, who retired as Director of Lands, Kedah, after 35 years' service, stated that this was the first time he saw the words "Penukar Hebah" on a document. He had never seen it before. In his opinion these words mean a gift with a condition to retransfer it to the donor when requested by him to do so. As PW4 had stated that this was the first time he had seen these words on a document it became necessary for the Court to make a research into the old records, if any, at the Land Office to discover if there were other evidence to support the interpretation given by PW4 or if they conveyed other meaning. The relevant law applicable to the document in question (Register Penukar No. 60/1331) and also Register Penukar No. 69/1331 referred to above is the Registration of Documents Enactment 1310 as the said documents were dated 21.5.1331 and 3.6.1331 respectively. The rest of the documents in Exhibit P-2B which did not bear the words "Register Penukar" were governed by the Registration of Sales and Mortgages (Land) Enactment 1331. Unfortunately the 1310 Enactment, which was repealed by the Registration of Sales and Mortgages (Land) 1331 Enactment on 11.7.31, is untraceable. But the Register of Documents under the said 1310 Enactment is fortunately still available. In it there are a number of documents with the words "Penukar Hebah" and "Penukar Perjualan" at the top right hand corner similar to the words "Penukar Hebah" in the title deed Exhibit "A". On careful perusal of these documents it would appear that the word "Penukar" means nothing more than transfer and therefore "Register Penukar" is Register of transfer and "Penukar Perjualan" or "Penukar Hebah" is just transfer by way of sale or by way of gift. In the Register Penukar 69/31 itself it was stated "Jual Putus" meaning an absolute sale and in Register Penukar 60/31 "Hebah Putus" meaning an outright gift. Therefore, with respect to PW4, to my mind "Register Penukar 60/31" could not be a conditional gift. If it had been the intention of the donors that the gift be subject to certain conditions such conditions would have appeared in the old "Deed of Sale". Even if the interpretation given by PW4 were correct, in my view, the proper person to claim the re-transfer would be the donor himself as the meaning assigned to the words "Penukar Hebah" by PW4 was "a gift with a condition to re-transfer it to the donor when requested by him to do so." In this case the claim was made by the legal representatives. In the circumstances, I am of opinion that the transfer was an outright gift and therefore the claim of the plaintiffs should be dismissed with costs.

Claim dismissed.

Solicitors: *Pillai, Lim, Lee & Hwang; Wong Sheng Chan.*

D.E.F. v. THE COMPTROLLER OF INCOME TAX

[C. A. (Rose C.J., Buttrose and Ambrose JJ.) January 17, 1961]

[Singapore — Civil Appeal No. 21 of 1960]

Revenue — Scheme of purchase and re-sale — Single transaction of purchase and sale of land — Whether profit therefrom liable to income tax.

Income Tax Ordinance (Cap. 166), s.10(1)(a) — "Trade" or "Business" — Isolated transaction — Adventure in the nature of trade.

The appellant was the Assistant Manager of a firm trading in commodities and was in no way concerned in and had nothing to do with property or dealings in land whatsoever. Having received information from the wife of a neighbour that a certain rubber estate in Ipoh was for sale, he purchased it on December 22, 1955, without previously inspecting it, for a sum of $240,000 which he borrowed free of interest from his brother. On January 9, 1956, he sold the estate to a company for $485,000, having negotiated the sale through his wife's brother-in-law. His wife and his brother were shareholders in the company, and his wife's brother-in-law, and the neighbour referred to above were two of its directors. Out of the proceeds of sale he repaid the loan and invested the balance. Throughout the transaction the appellant was not the nominee of any person or company.

The appellant was assessed by the Comptroller of Income Tax on the profit of $245,000. On the Comptroller refusing to amend the assessment after objection, the appellant appealed to the Board of Review on the ground that the profit did not arise from the carrying on of a trade or business within the meaning of those terms in section 10(1)(a) of the Income Tax Ordinance. The Board found in favour of the taxpayer and the Board's decision was as follows: "It is admitted that the appellant is not the nominee of any other interested person or company. The Board finds that the rubber estate was purchased and sold in pursuance of a scheme of purchase and resale. The Board does not accept the evidence of the appellant to the contrary. Nevertheless, the Board is of the opinion that the profit made by the appellant is a capital appreciation and not a profit chargeable to tax. The appeal is allowed with costs".

From that decision the Comptroller appealed to the High Court and the decision of the Board of Review was reversed by Chua J. who held that the transaction in question constituted a business within the meaning of section 10(1)(a) of the Ordinance.

Held: (1) the purchase and sale of the estate did not constitute a trade or business and accordingly the profit arising therefrom was not income subject to tax under section 10(1)(a) of the Income Tax Ordinance;